

~~Rule 1.14. Client under a disability.~~ Rule 1.14. Client with Diminished Capacity.

(a) When a client's ~~ability~~ capacity to make adequately considered decisions in connection with ~~the a~~ representation is ~~impaired~~ diminished, whether because of minority, mental ~~disability~~ impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) ~~A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when~~ When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, ~~the lawyer may~~ take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or ~~has a mental disorder or disability~~ suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, ~~an a~~ severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client ~~lacking legal competence with diminished capacity~~ often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. ~~Furthermore, to an increasing extent the law recognizes intermediate degrees of competence.~~ For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client ~~has~~ suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. ~~If the client does not have~~ Even if the person has a legal representative, ~~such as guardian, conservator, or trustee, the lawyer has the duty to maintain communication and discuss relevant matters with the client, and continue as far as reasonably possible to take action consistent with the client's directions and decisions.~~ the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. ~~If the client has no legal representative, the lawyer may only seek appointment of a guardian or take other protective action where the lawyer believes the client can not understand and weigh the risks and benefits related to the subject of the representation. This does not authorize the lawyer to take protective action because the client is not acting in what the lawyer considers to be the client's best interest. A client who is making decisions the lawyer believes are ill-considered is not necessarily unable to act in the client's own interest. In determining whether to take protective action, the lawyer may seek guidance from diagnosticians, family members or other interested persons. Disclosure of observations related to the client's condition to a diagnostician or other interested persons for the purposes of taking protective action does not violate Rule 1.6 (Confidentiality of Information) insofar as it is necessary to carry out the representation. If the lawyer determines that some type of protective action is necessary, the protective action should be the least restrictive under the~~

~~circumstances. The appointment of a guardian is a serious deprivation of the client's rights and ought not be undertaken if other, less drastic, solutions are available. In many circumstances, appointment of a representative may also be expensive or traumatic for the client. The authority to take protective action should be exercised with caution in a limited manner consistent with the nature of the particular lawyer/client relationship and the client's needs. For example, where there is no alternative to the appointment of a guardian but the lawyer/client relationship is limited to a single litigation matter, the least restrictive course for the lawyer might be to seek the appointment of only a guardian ad litem. If the lawyer has a longstanding relationship with the client involving all the client's legal matters, the lawyer may be more broadly authorized to seek appointment of a general guardian. However, it may be sufficient in many circumstances to arrange for a guardian to manage the client's financial affairs, allowing the client to continue managing the client's personal affairs. In limited emergency circumstances, the lawyer may be authorized to make decisions on behalf of a client. An example might be where an incompetent client is about to be evicted. However, the lawyer should take steps for formal appointment of a legal representative after the emergency has passed.~~ If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In

94 taking any protective action, the lawyer should be guided by such factors as the wishes
95 and values of the client to the extent known, the client's best interests and the goals of
96 intruding into the client's decision-making autonomy to the least extent feasible,
97 maximizing client capacities and respecting the client's family and social connections.

98 [6] In determining the extent of the client's diminished capacity, the lawyer should
99 consider and balance such factors as: the client's ability to articulate reasoning leading
100 to a decision, variability of state of mind and ability to appreciate consequences of a
101 decision; the substantive fairness of a decision; and the consistency of a decision with
102 the known long-term commitments and values of the client. In appropriate
103 circumstances, the lawyer may seek guidance from an appropriate diagnostician.

104 [7] If a legal representative has not been appointed, the lawyer should consider
105 whether appointment of a guardian ad litem, conservator or guardian is necessary to
106 protect the client's interests. Thus, if a client with diminished capacity has substantial
107 property that should be sold for the client's benefit, effective completion of the
108 transaction may require appointment of a legal representative. In addition, rules Rules
109 of procedure in litigation generally sometimes provide that minors or persons with a a
110 mental disability shall diminished capacity must be represented by a guardian or next
111 friend if they do not have a general guardian. However, disclosure of the client's
112 disability can In many circumstances, however, appointment of a legal representative
113 may be more expensive or traumatic for the client than circumstances in fact require.
114 Evaluation of such circumstances is a matter entrusted to the professional judgment of
115 the lawyer. In considering alternatives, however, the lawyer should be aware of any law
116 that requires the lawyer to advocate the least restrictive action on behalf of the client.

117 Disclosure of the Client's Condition

118 [8] Disclosure of the client's diminished capacity could adversely affect the
119 client'sclient's interests. For example, raising the question of disabilitydiminished
120 capacity could, in some circumstances, lead to proceedings for involuntary commitment.
121 The lawyer's Information relating to the representation is protected by Rule 1.6.
122 Therefore, unless authorized to do so, the lawyer may not disclose such information.
123 When taking protective action pursuant to paragraph (b), the lawyer is impliedly
124 authorized to make the necessary disclosures, even when the client directs the lawyer

to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

~~The lawyer may seek guidance from an appropriate diagnostician.~~

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.